IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

INTERASCO (GENEVA) S.A., INC., a foreign corporation,	)	
	)	No. 63701-1-I
Respondent,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
OTAN INVESTMENTS, LLC, a Washington limited liability company, and OTAN INVESTMENTS, LLC, a Washington limited liability company,	)	
Appellants.	)	FILED: May 17, 2010

Appelwick, J. — Interasco and Otan entered into a contract that required disputes to be resolved by arbitration. Otan, a limited liability company, filed a certificate of cancellation/withdrawal in 2006. Nearly two years later, a new filing created a limited liability company under the Otan name. Whether the arbitration clause can be enforced depends upon whether the contract binds Interasco and the second limited liability company. This is a question of arbitrability reserved for the courts to determine. We affirm the stay of arbitration and remand for further proceedings.

FACTS

In June 2006, Interasco (Geneva) S.A., Inc., formerly known as Interwood SA, Inc.,[1] contracted with Otan Investments, LLC, for the purchase and sale of sawn timber. The contract contains an arbitration clause that reads,

> All disputes that may arise between the Parties in connection with the present Contract, including interpretation and/or fulfillment of it, and impossible to be settled by means of negotiations, shall be finally settled, by the International Court of Arbitration, United States of America or Switzerland no recourse to law courts being permitted. Arbitration procedure is to be in accordance with regulations of this Court applying the current International Laws. The reward rendered by such arbitration court shall be final and binding for both Parties.

On August 18, 2008, Interasco filed a request for arbitration in the International Court of Arbitration, a division of the International Chamber of Commerce (ICC).[2] The request alleged that Otan had failed to supply and deliver timber in accordance with the contract. On October 29, 2008, Otan filed an answer to Interasco's request for arbitration and asserted various counterclaims, including breach of contract, breach of duty of good faith, breach of fiduciary duty, setoff, and unclean hands.

At the time the parties entered into the contract, Otan, was registered in Washington state, with unified business identifier (UBI) account number 602425940, and had been formed on September 2, 2004 (hereinafter Otan I). However, on November 13, 2006, Otan I filed a certificate of cancellation/withdrawal. Shortly after Interasco had filed its request for

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[1] The declaration of Essam Salem, president of Interasco, explains that Interwood changed its name to Interasco on or about January 31, 2007, through proper legal channels. The change was to the corporate name only.

[2] See http://www.iccwbo.org/court/

arbitration (August 18, 2008), Otan reformed[3] under the same name on August 27, 2008 (hereinafter Otan II).[4]

On November 7, 2008, Interasco withdrew its request for arbitration, having learned of Otan I's cancellation. Interasco represented to the ICC that Otan I had dissolved, and so it saw "no purpose in proceeding against a dissolved entity given the unlikelihood of enforcement of any award."[5] Interasco's counsel sent a letter to Otan II's counsel on December 2, 2008, asking Otan II to clarify its status as a limited liability company (LLC) and explain the cancellation.

Interasco, on December 16, 2008, dissatisfied with the information it had about Otan II's legal status (the record contains a copy of Otan I's certification of cancellation, but not any information about Otan II's relationship with Otan I), wrote to the ICC explaining that, although it had discovered that Otan I might have been "resurrected," it was concerned about whether Otan II could pursue its counterclaims.

On January 13, 2009, Otan II replied that it would nevertheless proceed

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[3] The record does not contain evidence of its reformation from the Washington Secretary of State. However, Otan represented to the ICC and Interasco that it reinstated Otan Investments, LLC, on August 27, 2008. The Secretary of State Corporations Division web site shows Otan I and Otan II have different UBI numbers. The web site shows that Otan I's UBI number is 602425940. http://www.sos.wa.gov/corps/corps_search.aspx (search "Enter UBI" for "602425940"; then follow "Otan Investments, LLC" hyperlink). It shows that Otan II's UBI number is 602859993. http://www.sos.wa.gov/corps/corps_search.aspx (search "Enter UBI" for "602859993"; then follow "Otan Investments, LLC" hyperlink).

[4] We use "Otan" when no distinction based on date of formation is necessary.

[5] Interasco's president also represented in his declaration that Interasco had not agreed to allow Otan I to assign its rights and obligations to another entity.

with its counterclaims. Interasco responded on January 16, 2009, arguing that Otan II had no "locus standi" to bring claims. The ICC invited Otan II to respond to what the ICC characterized as Interasco's "jurisdictional objections pursuant to Article 6(2) of the ICC Rules [of arbitration]." Otan II, in a document entitled "Respondent's Response to Claimant's Inquiries Regarding Standing," asserted that Interasco's concerns were not jurisdictional, as Interasco had already acknowledged the ICC's jurisdiction to hear the case by filing its request for arbitration. Rather, Otan II characterized the dispute as one concerning its standing to bring claims against Interasco, when "Otan Investments, LLC has the legal authority to pursue legal claims under the contract that bears Otan's name."

On May 7, 2009, the ICC ordered arbitration to proceed in accordance with article 6(2) of the ICC rules of arbitration (RA). A few days later, Interasco filed a complaint for injunctive relief and declaratory judgment in King County Superior Court. On June 4, 2009, Interasco moved to stay the ICC arbitration proceedings. The court granted the stay to resolve what it characterized as the issue of arbitrability of any claims between Otan II and Interasco. Otan II appeals the grant of the stay.

DISCUSSION

I. Arbitrability

Because this is an international dispute, the Federal Arbitration Act (FAA) applies.[6] See 9 U.S.C. §§ 201, 205; Tacoma Narrows Constructors v. Nippon

[6] The FAA mandates that both state and federal courts enforce the international

Steel-Kawada Bridge, Inc., 138 Wn. App. 203, 212–13, 156 P.3d 293 (2007), review granted, 163 Wn.2d 1011, 180 P.3d 1291 (2008).

Otan II contends that the court erred by concluding that the threshold issue presented by the parties was one of arbitrability. Otan II maintains that Interasco challenged Otan II's standing to pursue its counterclaims, which is a procedural defense. Interasco responds that Otan II is a nonsignatory to the contract, presenting the court with a basic issue of arbitrability.

Under the FAA, the general rule is that whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546–47, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964) (stating that whether or not parties have agreed to arbitrate and, if so, what issues they have agreed to arbitrate, are matters to be determined by the court on the basis of the contract entered into by the parties). The party claiming that arbitrability is for the arbitrator to decide bears the burden of proof and must show that the contract clearly manifests such an intention. Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753, 422 F.2d 546, 550 (7th Cir. 1970). Like all questions of law,

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Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). See 9 U.S.C. §§ 201, 205; Tacoma Narrows, 138 Wn. App. at 212–13. Chapter 2 of the FAA ratified the Convention. See 9 U.S.C. §§ 201–08.

The contract at issue here provides that "[a]ll disputes . . . shall be finally settled, by the International Court of Arbitration, United States of America or Switzerland . . . . Arbitration procedure is to be in accordance with regulations of this Court applying the current International Laws." In the briefs to this court, the parties cite and apply both the FAA and Washington's codification of the Uniform Arbitration Act, chapter 7.04A RCW, as well as common law applying both statutory schemes.

questions of arbitrability are reviewed de novo.[7] Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 311 (6th Cir. 2000); see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995).

Under the FAA, whether an arbitration agreement binds a nonsignator is a gateway dispute that is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002). While a strong public policy favoring arbitration is recognized under both federal and Washington law, arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit. Howsam, 537 U.S. at 83.

The record contains a certificate of cancellation showing that Otan I ceased to exist as an LLC on November 13, 2006. RCW 25.15.070(2)(c) ("A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation."); Chadwick

[7] Four principles guide the determination of whether the parties agreed to submit a particular dispute to arbitration: (1) the duty to submit a matter to arbitration arises from the contract itself; (2) the question of whether parties have agreed to arbitrate a dispute is a judicial one unless the parties clearly provide otherwise; (3) a court should not determine the underlying merits of a dispute in determining the arbitrability of an issue; and (4) arbitration of disputes is favored by the courts. AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 648–51, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). However, this rule does not inform the outcome here, as the real issue is whether Interasco and Otan II are "parties" to a contract.

Farms Owners Ass'n v. FHC, LLC, 166 Wn.2d 178, 194–95, 207 P.3d 1251 (2009). Once the company is canceled, as opposed to dissolved, it can no longer prosecute or defend suits; it no longer exists as a legal entity. Chadwick Farms, 166 Wn.2d at 194–95 (contrasting cancellation to the dissolution period, during which the LLC still exists and can sue or be sued).

The contract itself provides that "[n]either of the Parties to the present Contract has the right to assign by either of the ways its rights and obligations according to the present Contract to the third persons without prior written consent of the other Party." The only other evidence in the record regarding assignment of rights and obligations is the declaration of Interasco's president, stating Interasco had not agreed to allow Otan I to assign its rights and obligations to another entity.

Otan I ceased to exist. To defeat the stay and obtain enforcement of the arbitration clause, Otan II has to establish either that, as a matter of law, it is the same entity as Otan I, or that it legally stands in the shoes of Otan I. The evidence in the record is not sufficient to establish that Otan II is legally bound by the contract and entitled to enforce the arbitration clause entered into by Otan I. The purpose of the discovery and summary judgment schedule ordered by the trial court is to determine this question. The trial court did not err in staying arbitration to determine the nature of the relationship between Otan I and Otan II, and, based on that information, whether Otan II can enforce the original contract.[8]

[8] Otan's argument that nonparties to a contract can still, in some circumstances,

II. Waiver

Otan also argues that Interasco's choice to initiate arbitration proceedings against Otan in the ICC, wherein it claimed that Otan could not bring counterclaims, effectively waives Interasco's ability to argue the issue of Otan's status as one of arbitrability. The right to a judicial determination of arbitrability is not absolute; like many rights, it can be waived. Envtl. Barrier Co. v. Slurry Sys., Inc., 540 F.3d 598, 606 (7th Cir. 2008). In Berrier, Slurry Systems, Inc. (SSI), the party who later challenged arbitrability in court, had submitted to the jurisdiction of the arbitrator by filing a counterclaim. Id. SSI had argued to the arbitrator that Berrier did not have standing[9] to arbitrate but had never called the issue of arbitrability to the attention of the arbitrator. Id. The court held that the issue of arbitrability had been waived, as SSI had recast its prior argument about standing as a challenge to arbitrability only when it reached district court. Id. at 607.

The facts are distinct here. Interasco requested arbitration and submitted itself to the ICC's jurisdiction by doing so. The next communication Interasco

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enforce an agreement is correct, yet irrelevant. Before the nature of the relationship between Otan I and Otan II is established, it is impossible to determine whether the arbitration clause is binding on Otan II under some state law grounds. Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1902 (2009) (explaining that state law is applicable in determining which contracts are binding on nonparties under section 2 of the FAA, as traditional principles of state law allow a contract to be enforced by or against nonparties through assumption, piercing the corporate veil, later ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel) (citing 21 Richard A. Lord, Williston on Contracts § 57:19, 183 (4th ed. 2001)); see also Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 811 n.22, 225 P.3d 213 (2009).

[9] In the context of arbitration, standing "addresses the entitlement of the party to raise a given point before the arbitrator." Berrier, 540 F.3d at 605.

had with Otan and the ICC after its initial arbitration request was to explain its confusion about Otan's legal status. Interasco stated it had not received notice of Otan's dissolution prior to seeking arbitration.[10] Interasco maintained that arbitration was proper, despite the cancellation, if Otan's two agents (who were also included, along with Otan, in the request for arbitration) were assuming personal liability for fulfillment of the contract. Interasco also conceded that if the two agents were not assuming personal liability, no prima facie evidence of a valid arbitration agreement remained. With Otan I no longer in existence, Interasco stated it would "be content" to pursue its claims in court. These statements adequately called attention to the issue of arbitrability.

Interasco, like SSI, did question Otan II's standing to assert counterclaims, arguing that Otan II had no "locus standi" to bring claims. However, unlike in Berrier, this challenge took place in context of whether Otan II had any rights under the contract, and was not a procedural question of whether Otan II's claims were proper within the scope of an otherwise valid arbitration proceeding. The ICC itself recognized this when it framed the issue presented by Interasco as a jurisdictional rather than procedural concern, "[W]e note Claimant's inquiries, by which, we understand, Claimant raises jurisdictional objections pursuant to Article 6(2) of the ICC Rules." Article 6(2) provides that "if any party raises one or more pleas concerning the existence, validity or scope of

[10] At oral argument, Otan maintained that Interasco's request for arbitration, which named Otan as well as two of its agents, meant that Interasco knew Otan I had been cancelled and was seeking arbitration with Otan II. However, the mere fact of naming Otan's agents does not, ipso facto, mean that Interasco knew Otan I had been cancelled.

the arbitration agreement, the Court [ICC] may decide . . . that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist. . . . If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed." ICC, RA art. 6(2) (some emphasis added).

We hold the issue of arbitrability is not waived.

III. Motion to Strike

Interasco moved the court to strike pages 13–18 of Otan II's brief. In this portion of the opening brief, Otan argued the language in the contract, "[N]o recourse to law courts being permitted," required arbitration of even issues of arbitrability, which are generally reserved for a court's consideration. We decline to grant the motion to strike.[11] Otan's argument begs the question of who is bound by the contract. The threshold question in this appeal is whether Otan II can be bound by the contract. That question is properly resolved by the trial court. The nature of any subsequent proceeding flows from that determination.

We affirm and remand for further proceedings.

[11] Interasco also asks this court to strike Otan II's submission of the ICC Rules of Arbitration. As Otan II correctly notes, RAP 10.4(c) allows a party to include any rule that is material to the court's consideration of an issue raised on appeal. We deny the relief sought in this portion of the motion to strike as well.

Appelwick, J.

WE CONCUR:

Schindler, J. Cox, J.